

MEMORANDUM TO ATTORNEYS
APPOINTED UNDER THE CRIMINAL JUSTICE ACT

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1. **INTRODUCTION**

Representing an indigent party under court appointment sometimes presents special questions for a lawyer. This memorandum, which responds to questions most frequently asked by counsel, should be of assistance. The memorandum is intended as an adjunct to the Federal Rules of Appellate Procedure, the Fourth Circuit's Local Rules and Internal Operating Procedures, and the Plan in Implementation of the Criminal Justice Act.

2. **APPOINTMENT**

In direct criminal appeals, appointments to represent an indigent defendant are made upon the docketing of the appeal without prior notice to the attorney if the attorney formerly represented the defendant. In most other CJA cases, appointment of counsel is discretionary. Therein, the Court may, on petitioner's motion or sua sponte, appoint counsel. In all appeals, the issuance of an order of this Court constitutes the appointment. If the attorney represented the defendant in the lower court, the appointment is effective as of the date the notice of appeal was filed. The CJA Form 20, which is routinely issued with the judgment of this Court, is used as the attorney's voucher for compensation and reimbursement of expenses. Only services rendered and expenses incurred on appeal in this Court and in connection with a petition for writ of certiorari to the United States Supreme Court should be included on the voucher.

¹ "Defendant," when used in the memorandum, shall be construed to include petitioner in a collateral proceeding.

3. **COUNSEL'S CONTINUING OBLIGATION TO THE DEFENDANT**

Filing the notice of appeal, filing the motion for leave to proceed in forma pauperis, if appropriate, and ordering the transcript are continuing duties of trial counsel. Thereafter, if appointed by this Court, the attorney must complete the appeal, and, if necessary, take all steps required to protect the defendant's appellate rights. This obligation extends to filing a timely petition for writ of certiorari if the defendant wishes to seek review by the Supreme Court and in counsel's considered judgment there is a basis for seeking such review. Note that a person represented under the Criminal Justice Act is not required to pay a filing fee or costs, nor give security therefor, nor must he file a 28 U.S.C. §1915(a) affidavit, for an appeal.

4. **COMMUNICATION BETWEEN ATTORNEY AND CLIENT**

Complaints from defendants about their representation often stem more from counsel's failure to keep them informed than from counsel's handling of the case. The defendant should be advised periodically of the progress of the appeal and given an opportunity to express views on the issues to be raised. While counsel's judgment ultimately must prevail, the defendant in some instances, may be entitled to have specified additional issues raised.

5. **WITHDRAWAL OF COUNSEL**

Counsel may not withdraw from a case save for exceptional reasons. Neither a belief that the appeal is frivolous nor a defendant's expression of general dissatisfaction are grounds for withdrawal. However, the latter will be considered if a concomitant of another problem, such as defendant's assertion of ineffective assistance of counsel. A motion to withdraw should be filed as soon as circumstances allow. It should state fully the reason for the request and show service on the defendant as well as opposing counsel.

Counsel wishing to withdraw must advise the defendant of an indigent's continuing right to representation. If counsel's motion is granted, counsel must ensure that the defendant who desires an appointed attorney completes the requisite CJA application forms. When new counsel is appointed, withdrawing counsel shall furnish a report apprising successor counsel of all information relevant to the defendant's appeal. Finally, in CJA Form 20, withdrawing counsel shall state affirmatively that such counsel continued representation of the defendant until the motion to withdraw was granted, and furnished a current, informative report to succeeding counsel.

6. **ADMISSION TO PRACTICE**

Admission to the bar of this Court is not a prerequisite to appointment; however, an attorney must be admitted before, or within a reasonable time after, filing any motion, brief or other paper required to be signed by that lawyer. Application may be made by mail on a form that can be obtained from the Court's web site, www.ca4.uscourts.gov, or by calling the clerk's office. Because the normal admission fee of \$20.00 is waived in the case of court-appointed attorneys, an attorney

should make the appointment known upon submitting the application. (See FRAP 46 and Local Rule 46(b))

7. **RECORD ON APPEAL AND TRANSCRIPT**

Ordinarily the record on appeal consists of the original papers and documentary exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court. Upon receipt of the record on appeal or a certificate from the district court clerk indicating that the record on appeal is complete for purposes of the appeal, a briefing order is entered and sent to counsel. FRAP 10(b) details the steps appellant must take (within ten days after filing the notice of appeal) to order a transcript. The court reporter will not begin the transcript until the district court authorizes funding under the Criminal Justice Act, so counsel must timely complete and file the requisite CJA 23 and transcript order forms.

8. **BRIEFS AND JOINT APPENDIX**

Briefs and the joint appendix must conform to Rules 28 through 32 of FRAP. If counsel has a problem satisfying these requirements, write or call the clerk's office. The clerk's office staff, experienced in the application of the Rules, can offer suggestions and, in many instances, tangible help to enable the attorney to meet the Court's needs. Counsel should be aware, however, that counsel may be required to bear any additional costs associated with resubmitted corrected briefs and appendices in cases where counsel did not follow the Court's rule and format requirements in the initial submission.

The following points are emphasized:

(a) An appellant's pauper status does not lessen his responsibility for preparing and filing the joint appendix.

(b) Motions to dispense with the requirement of an appendix and to proceed on the original record are not routinely granted. However, if the appellant has pauper status and the record is short or the appeal is expedited, the Court may allow a request. Even so, the appellant must include an abbreviated appendix with the brief, as set forth in this Court's Local Rule 30(d).

(c) The requirement of an appendix is waived in cases in which an Anders brief is filed. In Anders cases, the Court must review the entire record, so an appendix, though permitted, is not mandatory.

(d) When related appeals have been consolidated, only one brief will be permitted per side, unless good cause is shown. As an exception, if counsel for one defendant intends to file an Anders brief, this attorney should prepare a separate brief and move to deconsolidate the Anders appeal from the cases that are not proceeding under Anders.

(e) The cost of printed briefs is not reimbursable under the Criminal Justice Act; therefore, it is recommended that the brief and appendix be reproduced by in-office photocopying

or photographic reproduction of typed material by a commercial printer, which are allowable expenses. Where photocopying services are performed in counsel's office, the reimbursement shall be limited to out-of-pocket expenses, not to exceed 15 cents per copy. For photocopying and other services in preparation of briefs and appendices by commercial printers, reimbursement shall not exceed 35 cents per copy. Double-sided copying must be used for appendices prepared by commercial printers. Single-sided copying is required for briefs. No appendix in a court-appointed case may exceed 250 sheets of double-sided copying (500 numbered pages) without advance permission of the Court.

(f) The Court requires in court-appointed cases that six copies of the brief and five copies of the appendix be filed, with one copy of the brief and appendix being served on counsel for each party separately represented. The cost of these required copies and one copy of the brief and appendix for defendant's counsel and one copy of the brief and appendix for defendant personally are reimbursable under the Criminal Justice Act.

9. **MERITLESS APPEAL**

Anders v. California, 386 U.S. 738, 744 (1967), states the obligations of court appointed counsel faced with a meritless appeal:

His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court -- not counsel -- then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Anders requires that counsel (1) conduct a conscientious examination of the record and (2) file a brief referring to anything in the record that might support the appeal. Penson v Ohio, 488 U.S. 75 (1988). Accordingly, counsel must order the complete record transcribed, including: pre-trial, trial, guilty plea, and sentencing proceedings. It is not necessary to order arraignments, bail hearings, voir dire, or opening and closing arguments unless those portions of the record might support an arguable issue on appeal. Under Anders, a brief that states only that there are no arguable issues will be deemed insufficient; rather, the brief must point to anything in the record that might arguably support an appeal. The brief must cite Anders and must indicate that a copy of the brief was sent to

the defendant and that the defendant was informed of the right to raise any additional issues within a reasonable time. The Court, in turn, will notify the defendant of the time within which the defendant may raise these additional arguments.

10. **ORAL ARGUMENT**

Local Rule 34(a) lists the standards used by the Court in deciding if oral argument will be allowed in a case. If argument is to be heard, counsel are notified several weeks before the date of argument.

Counsel must register in Room 226 at least a half hour before court starts. At that time counsel should be prepared to tell the clerk the number of minutes required for argument (a maximum of 15 minutes per side is allowed for cases in which the primary issue is the application of sentencing guidelines and a maximum of 20 minutes per side is allowed for other cases), and if representing the appellant, how much of that time will be allocated to rebuttal (up to one-third of the time may be allocated to rebuttal).

The Court will have studied the briefs and appendix before argument. Points for an effective argument are:

- (a) Do not argue from a manuscript.
- (b) Confine argument to the most crucial issues.
- (c) Do not argue any longer than necessary. If you do not need 20 minutes, do not use 20 minutes.
- (d) Do not evade a question; admit when a case is against you.
- (e) Know the record.

Counsel expecting to be assisted at argument by an eligible law student should ensure that the requirements of Local Rule 46(a) are met.

11. **DECISION**

The clerk's office will immediately send a copy of the opinion to counsel on the day that it is filed. Opinions are also posted to the Court's web site, www.ca4.uscourts.gov, beginning at 2:30 each day. Any petition for panel or en banc rehearing must be filed in the office of the clerk within 14 days of decision. The attorney should promptly inform the defendant of the decision and, if it is adverse, advise defendant of the right to petition the Supreme Court for a writ of certiorari. If the client requests that a petition for certiorari be filed but counsel believes that such a petition would be frivolous, counsel may file a motion to withdraw with this Court wherein counsel requests to be relieved of the responsibility of filing a petition for certiorari. The motion must reflect that a copy was served on the client and that the client was informed of the right to file a response to the motion

within seven days. The motion must also affirmatively state that counsel believes a petition for writ of certiorari would be frivolous.

To be timely, a petition for writ of certiorari must be filed in the Supreme Court within 90 days from the date of entry of judgment. If a petition for panel or en banc rehearing was filed and denied, the 90-day period runs from the denial of rehearing. Arranging for the transmittal of the record is unnecessary as the Supreme Court will request the record, if it so desires.

12. COMPENSATION AND REIMBURSABLE EXPENSES

To apply for compensation and reimbursement of expenses, counsel must complete the voucher segment of the CJA Form 20 within 60 days after final disposition of the case (unless good cause is shown), and submit all copies of the form to the clerk's office. The CJA 20 form and instructions are provided to counsel at the time the case is decided. After approval by the Court, the CJA Form 20 is electronically certified by the clerk's office for payment by the Administrative Office. The check is mailed from Washington, D.C., to counsel at the address given on the form.

Services rendered in preparing a petition for rehearing and/or petition for writ of certiorari should be included on the voucher; therefore, do not present the CJA 20 for payment prematurely. If counsel is applying for certiorari in the United States Supreme Court, then the CJA Form 20 should be filed within 60 days of the grant or denial of the petition. A copy of the petition for writ of certiorari must accompany the voucher.

Appointed counsel may claim compensation for services furnished by a partner or associate in appointed counsel's law firm, within the maximum compensation allowed by the Act, by separately identifying the provider of each service on court-appointed counsel's worksheet. If appointed counsel has obtained prior authorization from the Court for assistance from an attorney outside counsel's firm, and the attorney has thereafter entered an appearance in the case, counsel may also claim compensation for that attorney's time.

Normally, after a remand by this Court, counsel must submit a voucher within 60 days, as his appointment to this Court has ended. However, on a conditional remand, where counsel need not file a notice of appeal to return to this Court, counsel may wait to submit the voucher until after the final disposition of the case by this Court, and claim therein all compensation and expenses due from both the lower court and this court, as long as the services in the lower court were brief, and as long as counsel is not being compensated or reimbursed for the same matters by any other court.